

Communication of ASSEDEL to The UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism

Re: Report on the Call of the Special Rapporteur for the Promotion and Protection of Human Rights and Fundamental Freedoms During the Fight against Terrorism, Office of the UN High Commissioner for Human Rights, on the Call for Data Collection on the “Global Study on the Impact of Counter-Terrorism Measures on Civil Society and Civil Space¹”

The definition of terrorism² and terrorist criminals³ has been made by the legislation enacted for the fight against terrorism in the Republic of Turkey (Anti-Terror Law No. 3713). In the definition of terrorism, “use of force and violence” is regulated in the law as a mandatory element. A terrorist criminal is defined as a person who is a “member” of a terrorist organization. “Membership” is defined in abstract and general terms by the Court of Cassation decision⁴. Establishing and leading an armed organization is considered a crime in Article 314 of the Turkish Penal Code No. 5237⁵ where the article has categorized "founder, manager, member" 'roles'. The meaning and conditions of these concepts have been determined by the Court of Cassation decision.

After the 17/25 December 2013 corruption operations, the regime reacted aggressively to all legal evidence in the investigation file. The government defended itself by saying that the judicial police, prosecutors, and judges who carried out the operations were members of the Hizmet Movement and that these operations were a coup d'état. The government dismissed the judicial law enforcement personnel and changed their places of duty. The government made an investigation opened by order against law enforcement officers who carried out a corruption

¹ This report has been prepared on the evaluations of the Republic of Turkey's anti-terrorism legislation and the effects of the legislation and especially the practitioners on the society and civil sphere in the fight against terrorism. The report has been prepared by a lawyer who has participated in every stage of terrorism investigations and prosecutions many times and has personally observed the practices.

² Definition of terrorism-Article 1- Terrorism; using force and violence; To change the characteristics of the Republic, the political, legal, social, secular and economic order specified in the Constitution, to disrupt the indivisible integrity of the State with its territory and nation, to endanger the existence of the Turkish State and the Republic, to weaken the State authority, or They are all kinds of criminal actions to be taken by a person or persons belonging to an organization with the aim of destroying or seizing, destroying fundamental rights and freedoms, disrupting the internal and external security of the State, public order or general health.

³ Terrorist offender-Article 2- A person who is a member of organizations formed to achieve the objectives specified in the first article but commits a crime together or alone for these purposes or is a member of the organizations even if he/she does not commit the intended crime, is a terrorist criminal. Even if they are not members of a terrorist organization, those who commit crimes on behalf of the organization are also considered terrorist criminals.

⁴ Decision of the 16th Criminal Chamber of the Court of Cassation No. 21/4/2016 T., 2015/4672 E., 2016/2330 K.

⁵ Armed Organization-Article 314- (1) Any person who establishes or manages an armed organization in order to commit the crimes in the fourth and fifth sections of this section is sentenced to imprisonment from ten to fifteen years. (2) Those who become members of the organization defined in the first paragraph are sentenced to imprisonment from five to ten years.

operation against it. The government, which wanted to punish these law enforcement personnel, carried out an operation against and arrested them. The reasons for the detention of the judicial police consist of implementing the court decisions and following the instructions of the prosecutor. Even the judges who did not follow the instructions of the government and decided according to the law were arrested by the government⁶. In other words, a judge was arrested because of his independent and impartial decision. This is a first in the legal history of the Republic of Turkey. Realizing that it cannot make all judges work by order, the government has established criminal judgeships of peace (a new type of court) to make arrests by order, and only the next numbered judge among these judges will decide on the objections to the decision of these new court's judges⁷. As a result, the government has established a closed judicial system that can manage the investigations in big cities such as Ankara and Istanbul with a few judges whom the government can give instructions to. With this system, the regime could open investigations against the individuals and have them arrested as they wanted. In a normal country, the greatest support for a corruption operation would be expected from the opposition against the government. **However, the opposition parties remained silent and even tacitly supported the operation and the unlawfulness committed against the Hizmet Movement** in the following process after the corruption operations, and even the crimes committed by the government against innocent people. The reason for this might be the opposition's point of view that is contrary to the ideology of the Hizmet Movement.

The judicial decision that recognized the Hizmet Movement as a "terrorist" organization for the first time is the decision of the 16th Penal Chamber of the Court of Cassation, numbered 2015/3 E. and 2017/3 K. This decision has been finalized with the decision of the Criminal General Assembly of the Court of Cassation, dated 26.09.2017, numbered E. 2017/16-956 E. and 2017/370 K.⁸ In this regard, Ankara Chief Public Prosecutor Harun Kodalak admitted that by saying "We will declare the Gülen/Hizmet Movement an armed terrorist organization, but we had no evidence, and the people did not believe us", the file was tried to be constituted as a political crime, not legally⁹. The decision that recognizes the Hizmet Movement as a "terrorist" organization is unlawful because there was no action involving "force and violence" in the trial. When this criminal file is fully examined, it will be seen that the elements of the alleged crime do not exist. The decision was made based on fabricated evidence, just to conclude a penalty decision and to label the Hizmet Movement. The Court of Cassation did not seek in this file the conditions of being an armed terrorist organization and the elements of the crime that it sought in other files¹⁰.

⁶ https://www.bbc.com/turkce/haberler/2015/05/150501_hakimler

⁷ The Law No. 6545 on Amending the Turkish Penal Code and Some Laws was published in the Official Gazette dated 28 June 2014 and entered into force. The Criminal Courts of Peace were abolished with this law and replaced by the Criminal Judgeship of Peace.

⁸ <http://kazanci.com.tr/gunluk/cgk-2017-16-956.htm>

⁹ <https://www-tr724-com.cdn.ampproject.org/c/www.tr724.com/harun-kodalaktan-15-temmuz-tiyatrosu-itirafi-o-geceye-kadar-belge-bulamadik/amp>

¹⁰ Decision of the 16th Criminal Chamber of the Court of Cassation No. 21/4/2016 T., 2015/4672 E., 2016/2330 K. The relevant part of the decision is as follows; "In the trial phase, information on where, when, by whom and for what purpose the entity that is the subject of the lawsuit or investigation was established, and the relevant actions and activities throughout the country, is brought to the file in the relevant State institutions and determined by the judicial authorities in line with the facts and evidence present in the file, and the judicial decision is finalized. It is determined with certainty whether the formation is a crime, terrorism or an armed

After July 15, 2016, hundreds of thousands of people have been unlawfully punished by the courts because of activities that do not constitute a crime, such as opening a bank account, depositing money in a legal bank, becoming a member of an association, becoming a member of a union, sending their children to schools that are affiliated to the Hizmet Movement, using communication applications such as Bylock, eagle, cocoa, coco, signal, participate in conversations, voluntary aid activities, calling from a landline number whose caller and content are unknown, cancelling Digiturk membership, legally working in certain companies, being a newspaper subscriber, having 1 dollar in their wallets, keeping, reading or watching a book or video recording of Fethullah Gülen, helping poor people and giving scholarships to students.

“Legality and certainty” in crime are one of the most basic principles of criminal law¹¹. With these principles, it is aimed to clearly and unequivocally determine which behaviours will constitute a crime before the date of the crime. According to these principles; people should be aware of the prohibited actions, and they should know with certainty that whatever behaviour they commit will face a criminal conviction in the future. Persons who, on the date of the action, could not foresee that they would be condemned in the future due to their actions or who could not think that their actions would be considered unfair in the future, cannot be punished for their actions. It is not possible for people to know or foresee that an activity that was legal at a time would turn into a criminal conviction in the future, and it is against the principles of legality and certainty to accept legal activities as a crime later on.

Since the actions that will constitute the crime of membership in an armed organization are not clearly stated in the laws, which actions will constitute this crime are determined by jurisprudence. While the task of dealing with terrorist crimes belonged to the 9th Penal Chamber of the Court of Cassation until 2015, it was given to the 16th Penal Chamber of the Court of Cassation after that date. However, the 16th Criminal Chamber set aside established case law in interpreting procedural and substantive legislation.

In particular, it has made different and radical practices that are contradictory within itself and vary according to the organizations in terms of the actions that constitute the crime in Article 314 of the TPC. For example, while being included in the hierarchy of a terrorist organization in accordance with the established jurisprudence is possible with the unification of bilateral will (participation and acceptance)¹², the 16th Penal Chamber has accepted that in the proceedings against the Hizmet Movement, it is possible to become “a member of a terrorist organization”

terrorist organization...”; Decision of the 16th Criminal Chamber of the Court of Cassation No. 22/6/2015 T., 2015/4588 E., 2015/2133 K.; The decision of the Criminal General Assembly of the Court of Cassation, numbered 17/4/2007 T., 2007/9-69 E., 2007/99 K.; The decision of the 9th Criminal Chamber of the Court of Cassation, numbered 16/02/2010 T., 2008/19839 E., 2010/2059 K., is in the same direction.

¹¹ In Article 38 of the 1982 Constitution, “No one can be punished for an act that was not considered a crime by the law in force at the time it was committed; No one can be given a heavier penalty than the penalty imposed for that crime when he commits the crime. with the expression “the principle of legality in punishment” was taken as basis. Another regulation compatible with the 1982 Constitution is included in Article 2 of the Turkish Penal Code. According to the provision of the article, “No one can be punished, and a security measure cannot be applied for an act that is not expressly considered a crime by the law. No penalty and security measures other than the penalties and security measures written in the law can be imposed.”

¹² Decision of the Criminal General Assembly of the Court of Cassation, numbered 10/6/2008 T., 2007/9-270 E., 2008/164 K.

even without the consent of the leaders of the organization, that is, with a unilateral will¹³. This acceptance, the existence of members of the organization who are not in the knowledge, control and control of terrorist organizations means that it is not possible to accept that these people are included in an organizational hierarchy.

While moral support in favour of the organization, such as statements, articles, social media sharing and press releases praising the organization, its purpose or its members, are considered propaganda crimes in established practice¹⁴; The 16th Criminal Chamber has accepted that such moral aid and support to the terrorist organization will constitute the crime of membership¹⁵. In addition, while making a large number of propaganda for terrorist organizations is not considered a membership crime¹⁶; The 16th Criminal Chamber has accepted that such activities will also constitute the crime of membership¹⁷.

In the previous case laws, the activities that were carried out within the framework of the activities of legal organizations and that required the exercise of a legitimate right were not considered organizational¹⁸. Legal activities are based on membership in the organization and the principles of legality and certainty are disregarded in the proceedings against the Hizmet Movement. For example, depositing money in Bank Asya is considered a ‘terrorist’ activity. The opening ceremony of this bank was made by the person who is still the President of the country. It would not be possible to foresee that such a bank would be associated with ‘terrorism’ and being a customer of this bank at a time when it was under state control and working legally would constitute a membership indicator of a ‘terrorist’ organization in the future.

Likewise, bank customers cannot be expected to think that the money deposited in this bank will be accepted as if they were given to a ‘terrorist’ organization. Bank Asya was a legally operating bank with all operations under state control. If this bank was under the control of a ‘terrorist’ organization, the money deposited in this bank could not be used within the knowledge of the state, and for this reason, it is not possible to transfer it to another place to be used in illegal areas and especially in terrorist activities.

Similarly, the activities¹⁹ are accepted under the name of criteria constituting the crime of being a member of a terrorist organization or aiding the organization, the scope of these crimes, which are determined by judicial jurisprudence, has been expanded unpredictably.

¹³ Decision of the 16th Penal Chamber of the Court of Cassation, numbered 20/4/2015 T., 2015/1069 E., 2015/840 K.

¹⁴ Decision of the Criminal General Assembly of the Court of Cassation, numbered 12/2/2008T., 2007/9-230 E., 2008/23 K.

¹⁵ Decision of the 16th Penal Chamber of the Court of Cassation, numbered 05/7/2019 T., 2019/521 E., 2019/4769 K.

¹⁶ Decision of the 9th Penal Chamber of the Court of Cassation, numbered 16/5/2013 T., 2012/11301 E., 2013/7759 K.

¹⁷ Decision of the 16th Penal Chamber of the Court of Cassation, numbered 27.04.2015 T., 2015/1381 E., 2015/930 K.

¹⁸ Decision of the 9th Penal Chamber of the Court of Cassation, numbered 07.03.2002 T., 2001/2894 E., 2002/437 K.

¹⁹ Opening an account in a bank that is under the supervision and control of the state, depositing money in a bank, being a member of an association, being a member of a union, sending your child to schools that are close

The range of issues for which punishment is justified under the name of the criteria is so wide that there is hardly anyone in the country who will not be punished for membership in an organization with these criteria, and to be punished or not is entirely at the mercy of the practitioners. While no action is taken against some persons engaged in the same activities and these persons can continue their public duties; some people are arrested and punished for the same acts. For this reason, Article 314 of the TPC is not foreseeable and even a legal activity is sufficient to be accused of membership in a terrorist organization²⁰.

The moral element of the crime in Article 314 of the TCK is direct intent. The perpetrator must be included in the hierarchy of a structure or formation knowingly and willingly that he is an “armed terrorist organization.” However, in these trials, the fact that the defendants took part in this organization with the aim of “overthrowing the government by force of arms (coup)”, of which the Hizmet Movement is accused, and their will to commit a crime (the moral element) never comes to the fore. Courts, citing purely legal activities or the exercise of a fundamental right, assume that people know that this structure is an ‘armed’ organization. In short, the moral element is not proven in any trial, and **judgment is based entirely on presumptions**. It is not possible to decide that people are included in the hierarchy of the organization based on legal and routine activities without justification, without revealing the elements and with abstract claims. Again, in the current proceedings, the organization's legal conduct and structure are defined fictionally in abstract and vague terms aimed to label Hizmet Movement volunteers. These activities are then indicated as “continuous, diverse, and intense”, to justify an “organizational membership”. However, how these activities are continuous, diverse, and intense and for what reason they are considered organizational are not included in the decisions. Because the legal and routine activities could not serve to indicate as diverse, continuous, and intense “illegal” activities, however, tens of thousands of people are dismissed, ill-treated, and jailed based on such arbitrary trial decisions.

The universal principle of non-retroactivity of crimes and punishments is violated in these trials. Until the coup attempt, there was no administrative or criminal investigation regarding the persons currently sentenced. These people were punished for their legal and routine actions, without questioning the purpose for which they were engaged in these activities as if they were carrying out serious crimes and punishments in the past. If these people are guilty and more importantly, they are members of an armed organization, why was no action taken against these people until the coup attempt? Why did the state tolerate the members of an armed organization and allow their activities until July 15? Or, how were the people who were innocent on July 14, 2016, accepted as members of the organization the next day?

The answer to these questions is very simple; **there is no terrorist activity or crime, but there is a need for a justification for the punishment of individuals, and this justification is the lawful activities of the people in the past.** However, it is not possible to justify these activities

to the Gülen movement, using communication applications such as bylock, eagle, cocoa, coco, signal, participating in conversations, volunteering aid activities, calling from a landline number whose caller and content are unknown, canceling Digiturk membership, legally working in certain companies, being a newspaper subscriber, having 1 dollar, having, reading or watching a book or video recording of Fethullah Gülen, helping students and giving scholarships

²⁰ Selahattin Demirtaş/Türkiye (No. 2) [BD], B.No: 14305/17, 22/12/2020, § 280 ve 337.

retrospectively for punishment. In short, the convictions of individuals accused of being members of the Hizmet Movement were made without any criminally chargeable behaviour.

Criteria that are currently considered criminal are not applied equally to all persons. For example, while Ali Fuat Taşkesenlioğlu, one of the former executives of Bank Asya, was appointed as the chairman of the Capital Markets Board (SPK), people who deposited money in the bank were arrested and punished²¹. This is viable for all of the other criteria we mentioned in more detail above, such as being a member of the association, using communication programs, and sending their children to a school.

Domestic remedies have been rendered ineffective. Because decisions were taken in template forms and the ‘penalties’ were approved by the appeal authorities without reading the files. Judges-prosecutors, who followed directed instructions by the regime, became the perpetrators of the crime of genocide under the name of prosecuting the members of the Hizmet Movement with the comfort of the lack of an effective domestic remedy. Furthermore, the violation decisions given by the ECtHR and the United Nations Human Rights Committee have not been implemented.

As a result, the current regime in Turkey has declared the Hizmet Movement a “terrorist” organization after the 17/25 December 2013 corruption operations. Judges and prosecutors and civil servants in charge of enforcing the law established by the judicial police, by order and instruction, consider the legal and routine activities of Hizmet Movement supporters as criminal activity, and the judges and prosecutors who act with instructions, not those who do what the law requires, committed the crime of genocide against those accused of being members of the Hizmet Movement. Because it is clear that the crimes committed against innocent people are systematic and aimed at wiping out the Movement supporters. One opposition party tried to provide legitimacy to committing this crime of genocide by explaining what was done to the members of the Hizmet Movement by the regime as ordinary procedures within the legal system²². The reason for this covert support given by the opposition to the government is not the crimes of those accused of being a member of the Hizmet Movement, but possibly the enmity towards their views.

Dozens of collective torture cases were perpetrated against members of the Hizmet Movement²³ and reported by bar associations. Criminal complaints were filed and submitted against these torturers, however, they continue their courses. In a state of law, the rights of citizens are guaranteed by the constitution. If the constitutional rights of a person are violated systematically, and if this person is tried to be wiped out in various ways because of his/her loyal feelings to a certain group or holding a certain view, the crime of "genocide" will be committed.

²¹ <https://www.diken.com.tr/yeni-spk-baskani-atandi-fetoden-kapatilan-bank-asyada-16-yil-hizmeti-var/>

²² <https://boldmedya.com/2022/01/27/iktidara-gelseler-ne-degisecek-iskence-cigliklarina-akp-sessiz-muhalefetse-sagir/>

²³ <https://ankarabarusu.org.tr/duyuru/4227e110-8a71-11ed-ac25-000c29c9dfce>